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In the Supreme Court of the United States
OCTOBER TERM, 1989

CHICAGO AND NORTHWESTERN TRANSPORTATION
COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20432

QUESTIONS PRESENTED

Whether the court of appeals improperly rejected petitioners' claims that venue was improper in this case and that this case was not justiciable.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

<i>Black v. ICC</i> , 762 F.2d 106 (D.C. Cir. 1985)	2
<i>Burlington Northern R.R. v. United Transp. Union</i> , 848 F.2d 856 (8th Cir.), cert. denied, 109 S. Ct. 499 (1988)	4
<i>Chicago, M., St. P. & Pac. R.R., In re</i> , 658 F.2d 1149 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982)	2
<i>Ex parte No. 392 (Sub.-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901</i> , 1 I.C.C.2d 810 (1985), aff'd sub nom. <i>Illinois Commerce Commission v. ICC</i> , 817 F.2d 145 (D.C. Cir. 1987)	2, 3
<i>Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694 (1982)	7
<i>Leroy v. Great Western United Corp.</i> , 443 U.S. 173 (1979)	6-7
<i>Neirbo v. Bethlehem Shipbuilding Corp.</i> , 308 U.S. 165 (1939)	7
<i>Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n</i> , 109 S. Ct. 2584 (1989)	3, 4

Statutes and regulations:

Interstate Commerce Act, 49 U.S.C. 10101 <i>et seq.</i> :	
49 U.S.C. 10102(19)	2
49 U.S.C. 10505	2
49 U.S.C. 10901	2
49 U.S.C. 10901(e)	2
49 U.S.C. 11343	3

Statutes and regulations—Continued:	Page
Norris-LaGuardia Act, 29 U.S.C. 101 <i>et seq.</i>	3
Railway Labor Act, 45 U.S.C. 151 <i>et seq.</i>	3
28 U.S.C. 2342	4
28 U.S.C. 2343	4
49 C.F.R. (1987) :	
Section 1150.1 (a)	2
Section 1150.32 (b)	2

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OPINIONS BELOW

The opinion of the court of appeals after remand from this Court (Pet. App. 1a-2a) is reported at 888 F.2d 1227. An earlier opinion of the court of appeals (Pet. App. 5a-7a) in this case is reported at 861 F.2d 1082. The order of the ICC (Pet. App. 10a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1989. The petition for a writ of certiorari was filed on January 29, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 10901 of the Interstate Commerce Act generally requires that those seeking to acquire or begin operations over any rail line must first secure the authorization of the ICC.¹ Alternatively, a non-carrier may seek an exemption from the approval process under regulations issued pursuant to 49 U.S.C. 10505.² The grant of the exemption authorizes the acquisition. See *Ex parte No. 392 (Sub.-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), aff'd *sub nom. Illinois Commerce Commission v. ICC (Class Exemption)*, 817 F.2d 145 (D.C. Cir. 1987) (Table). In any acquisition accomplished pursuant to Section 10901 or through exemption via Section 10505, the ICC has the discretion to determine to what extent, if any, labor protective conditions should be imposed on the transaction for the benefit of employees affected by the transaction. 49 U.S.C. 10901(e). In contrast, labor protection is mandatory in rail transactions approved pur-

¹ Although 49 U.S.C. 10901 is addressed in terms to "rail carrier[s]," see 49 U.S.C. 10102(19) (definition of "rail carrier"), regulations and judicial decisions have required non-carriers to comply with its provisions. See 49 C.F.R. 1150.1(a) (1987); *Black v. ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985); *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1169 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

² 49 C.F.R. 1150.32(b) (1987).

suant to 49 U.S.C. 11343, which governs acquisitions of rail lines by an existing rail carrier. See generally *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2590-2591 (1989).

2. Petitioner, a carrier subject to the Act, and Fox River Valley Railroad Company (FRVR), a non-carrier, entered into an agreement for petitioner to sell FRVR a rail line in Wisconsin known as "Duck Creek South". In December 1987, petitioner and FRVR filed a notice of exemption signalling their intention to consummate the transaction pursuant to the ICC's *Class Exemption* procedure. At the same time the parties filed with the ICC a petition for a declaratory order. The petition asked the ICC to declare whether the agency's jurisdiction over line sales and its discretion to impose labor protective conditions on the sale displaces the Railway Labor Act, 45 U.S.C. 151 *et seq.* and the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* Respondent Railway Labor Executives' Association (RLEA) opposed the petition.

The ICC issued an opinion addressing the petition on January 28, 1988. Pet. App. 10a-29a. The ICC concluded, *inter alia*, that the Interstate Commerce Act could supersede provisions of the Railway Labor Act and the Norris-LaGuardia Act where necessary to ensure the consummation of rail transactions authorized by the agency and found to be in the public interest. Pet. App. 20a-21a. The decision reaffirmed the ICC's position that the Interstate Commerce Act granted the agency the authority to resolve labor problems that could, if not resolved, act as obstacles to the consummation of approved transactions. Pet. App. 23a-24a.

3. RLEA filed a petition for review of the ICC's declaratory order in the Eighth Circuit, arguing that

the ICC lacked authority to issue the order and that the order was mistaken as a matter of law. Petitioner and FRVR intervened and petitioner, citing 28 U.S.C. 2343 and supported by the ICC, moved to transfer the case to the District of Columbia Circuit. Petitioner also argued that the petition for review should be dismissed because the ICC's opinion was not a final order subject to judicial review under 28 U.S.C. 2342.

On November 21, 1988, the court of appeals issued its first opinion in this case. The court did not address the transfer motion or petitioner's argument that the case should be dismissed. Rather, relying on a prior decision, *Burlington Northern R.R. v. United Transp. Union*, 848 F.2d 856, 864 (8th Cir.), cert. denied, 109 S. Ct. 499 (1988), it held that the Railway Labor Act must be accommodated to the agency's authority to impose labor protective conditions in line sales, but that the Norris LaGuardia Act did not require a similar accommodation since "there is no inherent incompatibility" between the Interstate Commerce Act and the Norris LaGuardia Act. Pet. App. 6a (internal quotation marks omitted). The court affirmed the Commission's decision "as clarified." Pet. App. 9a.

4. Petitioner and RLEA both filed petitions for a writ of certiorari, asking that the Court hold this case pending its decision in *Pittsburgh & Lake Erie R.R. v. Railway Executives' Ass'n*, 109 S. Ct. 2584 (1989), which raised similar issues. In its petition, petitioner did not raise—or even mention—its contentions about improper venue and lack of justiciability. After the Court decided *Pittsburgh & Lake Erie*, the Court granted both petitions, vacated the judgment of the court of appeals, and remanded

for further consideration in light of the Court's decision. 109 S. Ct. at 3209.

5. On remand, the court of appeals called on the parties for letter briefs detailing their positions on the impact of *Pittsburgh & Lake Erie* on this case. Although petitioner appears to have raised the issue of the justiciability of this case in its letter brief, it did not raise or mention the venue issue. On October 30, 1989, the court of appeals issued an order adopting the position of the Department of Justice and setting aside the ICC's declaratory ruling. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends that the court of appeals erred in not transferring this case to the D.C. Circuit and in not holding that the ICC order was unreviewable. Neither of these issues warrants further review by this Court.

1. In its first petition for certiorari in this case, petitioner did not raise—or even mention—the two issues raised in this petition. The sole question presented in the first petition was “[w]hether the court of appeals erroneously held that the Norris-LaGuardia Act deprives federal courts of jurisdiction to enjoin strikes over line sales that the Interstate Commerce Commission has approved under the Interstate Commerce Act as being in the public interest, where the Interstate Commerce Act vests the Commission with jurisdiction to resolve labor disputes arising from such sales.” 88-1706 Pet. i (filed Apr. 20, 1989). There was thus no suggestion either in the question presented, or elsewhere in the petition, that petitioner had threshold objections to the

decision of the Eighth Circuit to reach the merits of the case.³

Petitioner's failure even to mention these contentions in its first petition militates strongly against further review of these issues now. A party ought not be permitted to present the merits of a case to this Court for review while withholding notice that it intends to raise in a further petition for certiorari potentially dispositive threshold issues if this Court—or a lower court on remand—reaches an unfavorable decision on the merits. Indeed, if the threshold questions petitioner raises warrant further review by this Court now, they did so as well at the time that the first petition for certiorari was filed. Especially in the absence of a compelling explanation for petitioner's failure to raise the two issues in its prior petition, the Court should act on the basis of petitioner's initial determination that these questions do not warrant further review.

The fact that the venue issue is subject to waiver, see *Leroy v. Great Western United Corp.*, 443 U.S.

³ Although the cross-petition of RLEA did assert what it characterized as a "jurisdictional" defect in the Eighth Circuit's disposition of the case, see 88-1874 Cross-Pet. i, 9-12, RLEA's argument was fundamentally different from the justiciability argument now advanced by petitioner. RLEA argued in the cross-petition that the ICC was without jurisdiction to issue its declaratory order, and that the Eighth Circuit accordingly had no "jurisdiction" to do other than vacate the order. *Ibid.* Because neither this argument nor any other material in the court of appeals' opinion or in any of the other briefs or memoranda filed with this Court at the time of the first petition would have alerted the Court to the two claims now asserted by petitioner, the Court had little or no opportunity while considering the first petition to learn that these issues were in the case at all.

173, 180-181 (1979); *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-168 (1939), while at least some aspects of petitioner's justiciability contention are not, see *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), does not alter the conclusion that further review is not warranted with respect to both issues. For even if both issues technically remain in the case and are thus within the power of this Court to adjudicate, the Court should reject petitioner's efforts to raise both issues only on this second petition for certiorari. Piecemeal litigation of different issues in a case on successive petitions for certiorari is an uneconomical use of the Court's limited resources.

2. Petitioner also fails to mention that the court of appeals did not address either the venue or the justiciability issues in this case. Although the court of appeals necessarily ruled against petitioner on these issues in reaching the merits of the case, the ground of the court's decision and its relationship to the decisions of this and other courts with which it may be in conflict, see Pet. 12-18 (justiciability), 20-22 (venue), is not clear. This factor substantially decreases the significance of the decision of the court of appeals on these issues and further limits the need for this Court to undertake further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

CLYDE J. HART, JR.
*Attorney
Interstate Commerce Commission*

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